

## **Flexibility, Ambiguity and the Construction of the Antarctic Treaty System**

### **INTRODUCTION**

As an expert in neither Antarctic politics nor international law, I concede to being somewhat impressionable in my uptake of information on these subjects. It was recently conveyed to me that the success of the Antarctic Treaty System (ATS) was due in a large part to its *flexibility*. This assertion seemed plausible, the Treaty has endured and accommodated significant international changes over last 50 years, and through its instruments and measures has successfully maintained the Antarctic as a place for peace and science, the respective objects of Article I and II of the Antarctic Treaty. If flexibility is a quality which has afforded such success then in relation to the Treaty it is considered here a topic worthy of further exploration.

The first part of this review provides a scan of the Antarctic literature in an effort to understand the origins of ATSs reputation for the flexibility of the system as a whole. In doing so, this review identifies a shift over time in the identification of flexibility as a positive attribute of the system, to one having increasingly problematic consequences. Within the Annexes and Articles of Treaty instruments themselves a second use of flexibility as a concept is also detected, particular attention is paid to Article IV of the Treaty which is central to the issue of flexibility for the system as a whole. Article IV has also been subject to diverse and evolving opinion regarding its effect on the overall ability of the system to accommodate change. Some see it as a universally accommodating mechanism which will take the Treaty forward (Beck, 2009; Heap, 1983; Joyner, 1999; Watts, 1986), whilst others see it as limiting and cause for the ATS to have stalled in recent years (Grob, 2007; Hemmings, 2007; Marcoux, 1970). The second and third parts of the paper review briefly explore an observe shift from the use of *flexibility* to *ambiguity* in the language used to describe the ATS. At this point, reference material is extended outside the literature of Antarctica to broader sources which consider the use of ambiguity as a constructive mechanism. As a conclusion some questions are proposed regarding the idiosyncrasies of ambiguity in the context of the ATS.

### **PART 1: FLEXIBILITY - THE SYSTEM**

Put simply by a prolific commentator of the ATS Christopher Joyner (1998), the process of Antarctic Treaty development is referred to as the “Convention-with-additional-protocols” (p. 39) method of treaty making. Through this method, norms inform the development of new protocols and measures can be added to the ATS by way of a consensus voting system between Antarctic Treaty Consultative Parties

(ATCPs). In this manner needs can be accommodated as they arise and the flexibility of the system is maintained. Joyner also indicates that Antarctic Treaty Consultative Meetings (ATCMs) which are given effect by Article IX of the Antarctic Treaty are a critical element in the enactment of this process. They are the main forum for discussion in the ATS and through ATCMs the ATS can be modified to accommodate change. Flexibility in this regard is not however a feature unique to the ATS alone. Much of the flexibility of the ATS process was (in 1959) the result of the recognized norms of Customary International Law, which were later codified into the 1969 Vienna Convention on the Law of Treaties (VCLT) ("Vienna Convention on the Law of Treaties," 2005).

Under VCLT Article 40, multilateral treaties may be amended or added to such that needs are met as they arise. In the case of the ATS, instruments that have entered into effect in this manner are: Agreed Measures, 1964; Convention for the Conservation of Antarctic Seals (CCAS), 1972; Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), 1980; and the Madrid Protocol on Environmental Protection, 1991. VCLT Article 40 also indicates that as new instruments are developed, parties already signatory to the prior Treaty are not bound to the amending agreement but have the option of becoming a signatory. This is the case for New Zealand and CCAS for example. Conversely, any state which becomes a signatory to a later instrument is not bound by the provisions of an earlier agreement unless expressly stated. This is the case with CCAMLR for the European Union, Namibia and Vanuatu. These differing types of membership can lead to complications in negotiation and as more instruments are added and the membership of each diversifies limiting the flexibility of the system as a whole.

An informative and accessible explanation of the ATS as a system is provided by Vidas (1996) in the co-edited volume *Governing the Antarctic: the effectiveness and legitimacy of the Antarctic Treaty System*. This chapter is of interest as it sits centrally within a chronological gradient of opinion surrounding the flexibility of the ATS. This gradient reveals a shift in commentary over the decades from positions predominantly in praise of the ATS in the ATSs early history to those of increasing concern over the ability of the ATS to accommodate future challenges in the present day. As a result, Vidas' commentary could be considered a well balanced representation of the Treaty's "net worth" and it is identified here as such.

Vidas downplays any claims of exclusivity between the international community and the ATS, identifying the ATS as a 'special' system but one which is not separate to the international community. He outlines the structure of the ATS in far greater detail than the description based on the VCLT above in a 4 tiered description covering: 1) The Antarctic Treaty, 1959; 2) the more than 200 recommendations which are in effect; 3) the treaties in force such as CCAS, CCAMLR and the Madrid Protocol; and 4) measures in effect under those treaties. From this it can be appreciated that while the ATS is complex in its structure, that to

date (1996) it had been flexible enough to accommodate concerns as they arose. Vidas also dispels suggestions that the ATS is becoming fragmented asserting that “the normative components of the ATS are separate legal instruments in terms of legal technique,” but “all of them are closely linked to the Antarctic Treaty and mutually interrelated.” (p. 43) this level of integration is credited to the consistent intentions of the negotiating states. Vidas attributes the successful evolution of the ATS to the mechanism of ATCMs, and enlighteningly also to the informal practice of consultation among Consultative Parties through diplomatic channels.

On the flip-side Vidas begins to pick up on a change in the types of actors becoming involved in the ATS and their influence on processes and norms. It is observed that there is an increasing tendency toward involvement from international and non-governmental organizations. Despite this organizations not being Consultative Parties, they are able to influence discussion. They do not however have direct influence in decision making. The observation of increased influence from these types of organizations becomes more prevalent from this time onwards in the literature, and other observers begin to pay more credence to the potential of the system being influenced from the outside rather than from within (Grob, 2007; Hemmings, 2007).

Prior to Vidas’ chapter, and in the year of the signing of the Madrid Protocol, Suter (1991) mused over the capacity for the ATS to adapt to meet future challenges. He affirmed “Treaties survive when they are flexible and continue to meet the changing needs of parties to them.” In his paper he is confident that “assuming ownership and control questions do not need to be addressed” the ATS could continue to evolve to address future challenges (p. 149). Suter’s sentiments on ownership and control reciprocate those of Heap (1983). “The continuation of international cooperation in the Antarctic depends on the states concerned forbearing to press their respective views about territorial sovereignty in the Antarctic to a logical conclusion. Without such forbearance the Antarctic would, contrary to the stated objectives of the Antarctic Treaty, almost certainly ‘become the scene of international discord’ (p. 107). Considering once again Vidas’ observations, it is clear that at this time there was little consideration from Heap and others that the system might be forced to change from the outside rather than from within. What if for the States involved, re-addressing Article IV was a matter necessity rather than of will? Given Vidas’ observations regarding increased international and non-governmental influence in 1996 and the fact that no new instruments had been developed since the Madrid Protocol is there indication that this was the beginning of the process of the Treaty beginning to stall?

A decade after Vidas observed increasing and diversifying interest in Antarctica, Hemmings (2007) asserts more focused claims of increasing external influence. He does so with greater conviction and places the

drivers of this change within the contemporary discourse of globalization. The key arguments cut both ways. Firstly that increased non-governmental, commercial and illegal activity around the continent is intensifying challenging existing claims to sovereignty, and secondly that existing claims to sovereignty have stalled the evolution of the ATS, thus limiting the capacity for the regulation and control of such activities around the continent. This damning synopsis would indicate that the ATS in its current form has lost any capacity for flexibility or evolution at present, and again the issue of sovereignty is squarely at the centre of the issue. Hemmings observes that the failure of the ATS to develop any new instruments since the introduction of the Madrid Protocol may reflect a relative decline in multilateral cooperation globally. It is that this period of dormancy has occurred at the same time as the most rapid expansion of human activity in the Antarctic that is the most significant cause for alarm.

In another commentary from the same year, Grob (2007) employs a tone of caution and wariness surrounding the future of Article IV. She recognizes it as a success at the time that it was implemented but sees it as a problem for the future of the continent. For audiences accustomed to the milder commentary of Suter (1983) and Vidas (1991), her assertions may tend at times toward the sensational. However her proposals for a “melt down” and de-claiming of Antarctic sovereignty are well rationalized by concise descriptions of the competing theories of sovereignty surrounding Antarctica in recent history. Indeed her position seems fair, “By denying claimant countries their territorial claims everyone benefits from the certainty of Antarctica’s continuance as a site for peace and scientific study” (p. 483). Grob walks a fine line between ensuring the equitable distribution of Antarctica and its resources, and the effective de-regulating of Antarctica through the removal of the incentive of claimant states to assure instruments such as the Madrid Protocol are effectively implemented in the future. From these last two examples (Hemmings and Grob) it is clear in the contemporary debate at least, that the ATSs reputation for flexibility in the literature at least is progressively becoming obsolete.

Grob’s case could perhaps benefit from a deconstruction of Article IV provided a decade earlier by Watts (1992). Watts methodically removes the sting from any claims to sovereignty by firstly identifying that under Article IV it would not be possible for any party with a “basis to claim” to transform this into an “actual claim” as this would constitute a “new claim”. And that secondly any claim by claimants to the un-claimed sector is prevented (p.132). These statements seem terminal to the prospect of any claimant ever actually being able to establish absolute sovereignty.

In this section we have observed through the Joyner, the VCLT, Vidas, Suter, Heap, Hemmings and Grob the identification of flexibility as an attribute of the ATS as a system and then its progressive reduction through increasing constraints associated with Article IV and claims to sovereignty, the next section will

briefly traverse this process of Article IVs translation from a tool for flexibility to one of constraint. In doing so the concept of *ambiguity* is identified as having the potential to be more constructive than *flexibility* in future developments of Article IV.

## **PART 2 - ARTICLE IV FROM FLEXIBILITY TO AMBIGUITY**

On numerous occasions prolific author on Antarctic governance, Christopher Joyner, described Article IV of the Treaty as the legal “flexi-glue” that allows the Treaty to operate (Joyner, 1992, 1999). Here the concept of flexibility has been taken further than being just an attribute of the system and has is proposed as an attribute of Article IV itself. This adoption of the idea of flexibility appears influential in the concept becoming embedded in the rhetoric of flexibility surrounding the ATS as a whole. Joyner’s use of the term spread from beyond the literature of Antarctica and began to emerge in more general discussions of the ATS in broader discussions of international relations. (Joyner, 1998).

Article IV has also been described as “the corner stone of the Antarctic Treaty” (Watts, 1992)(p.126); “a most remarkable agreement” (Watts, 1986)(p.67); but also as “a purgatory of ambiguity” (Marcoux, 1970)(p.379). Whilst Marcoux (1970) almost certainly meant used the term *ambiguity* in the negative sense, there is an emerging literature on use of ambiguity as a constructive device in facilitating global Treaties. Joyner (2009) recently drew on ambiguity in a positive light as a term to describe Article IV in his invited reflection on the Antarctic Treaty (p. 15).

## **PART 3 – AMBIGUITY**

*When I start on a painting, I usually begin with some sense of what the image will be, but as I’m thinking, entirely independent ideas take over and completely unexpected qualities sneak in, making their presence felt. Often the work seems to assert a logic of its own and determines a direction all by itself. The spaces I create tend to have this mysterious edge to them. They become airy and ambiguous and I like that. – Margaret Elliot*

I would here like to briefly extend the discussion of ambiguity as a constructive mechanism to sources outside of the Antarctic Literature. Ambiguity is a concept which is becoming more prolific in its usage in the resolution of international disputes. Pehar (2001) identifies three way that ambiguity is used in securing peace agreements these are referential ambiguity, syntactical ambiguity and cross-textual ambiguity. In the discussion on these three types the particular use of ambiguity in the Antarctic Treaty

does not seem to fit any of them particularly well suggesting that in the multi-lateral environment of the ATS, Article IV may be unique in its development amidst other international. Pehar is cautious of the use of ambiguity in securing peace agreements, with the potential for conflict over time being central to this. As we have seen with the Antarctic Treaty the risk associated with the use of ambiguity in securing a Treaty may for the short term outweigh the potential for conflict later.

Another interesting discussion picked up on by Pehar is the initial development of the theory of ambiguity by the Greek philosopher Aristotle. It seems fitting that the individual responsible for first theorizing the Southern Continent would be linked to the central issue of its definition in this way.

The agreement to disagree on Article IV has been referred to as 'Soft Law' (Joyner, 1998, p. 40) often criticized for its non-binding quality. However, as identified with caution by Pehar, such 'soft law' remains useful for the development of principles and for the development of customary international law. It is the ambiguous nature of these types of agreement and their lack of binding authority which attracts governments to sign them. Resulting to ambiguous agreements is observed to have the potential for interim hortatory measures to become established and indicate the direction a full resolution may take in the future.

Gautier (1996) also accepts this as a course of action. "When there is a real need for some institution and when it is not possible (for political or other reasons) to establish a classical organization, States are obliged to find a[n] imaginative way out. This process can be described as "institutional developments". The use of this soft expression leaves open the question of the legal qualification to be given to this evolution." (Gautier, 1996)(p.33)

Joyner concedes that in the long term, for such interim measures to be considered effective, "what becomes critical is the willingness of states to later adopt more binding legal measures." (Joyner 1999, p41). In the case of the ATS this willingness remains yet to be seen, but the renewed debate surround Article IV seems almost certainly part of the broader evolution of the ATS.

## **CONCLUSION**

The capacity for the treaty to evolve is fundamental to its ability to accommodate changes in the political, economic and environmental context of Antarctica. It has been shown that the processes associated with the Antarctic Treaty are flexible and can enable evolution over time. However provisions such as Article IV which was historically implemented to great effect can become a sticking point in time. In the context of other global treaties however, the complexities of Article IV are not insurmountable. It is considered that there would be value to be derived from a comparison of the nuances and idiosyncrasies in the use of ambiguity as a constructive device in the ATS both historically and in the future compared with the use of ambiguity in the development of other international treaties. What is imperative should the sovereignty issue be revisited in the Antarctic is that any hortatory solution or the use of ambiguity to keep the system moving in the short term does not occur at the expense of the flexibility of the system over longer time scales.

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